Supreme Court, U.S.
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No. 94-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD HAYDOO, *et al.*,

Petitioners,

v.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR.; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL AND SALARIED WORKERS, AFL-CIO and GENERAL ELECTRIC PENSION FUND BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

MARK A. ROCK
SCHWARZWALD & ROCK
616 Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114
(216) 566-1600

JAMES G. MAURO, JR.
1126 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 296-1200

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

13 pp

QUESTION PRESENTED

IUE is not dissatisfied with Petitioners' formulation of the question presented by this writ but the Court is advised that this question grossly misrepresents the proceedings which transpired before the District Court.

LIST OF PARTIES

Petitioners' statement is acceptable.

TABLE OF CONTENTS

QUESTION PRESENTED i
LIST OF PARTIES i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1
COUNTER-STATEMENT OF THE CASE 1
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 3

I. Petitioners' Question Presented Misrepresents the Decisions of the Sixth Circuit and the District Court Which Dismissed This Case 3

II. Petitioners Attempt To Obscure The Findings of Dilatory Case Management 4

III. The District Court Judge Did Not Abuse His Discretion 6

IV. No Special Consideration Warrants Granting Certiorari 8

V. Conclusion 9

TABLE OF AUTHORITIES

Cases Cited

Buck v. Dept. of Agriculture, 960 F.2d 603 (6th Cir. 1992) 8

Carter v. City of Memphis, 636 F.2d 159 (6th Cir. 1980) 8

Link v. Wabash Railroad Co., 370 U.S. 626 (1962) 8

Little v. Yeutter, 984 F.2d 160 (6th Cir. 1993) 8

Shepard Claims Service, Inc. v. William Darrag & Associates, 796 F.2d 190 (6th Cir. 1986) 8

Federal Rules Cited

Fed. R. Civ. P. 11 1

Fed. R. Civ. P. 41 3

Fed. R. Civ. P. 41(b) 3, 4, 8

Supreme Court Rules Cited

Rule 10 8

Rule 14.1(a) 5

OPINIONS BELOW

Petitioners' statement of the Opinions Below is incomplete. It omits the dispositive decision of the District Court, which was reprinted in the Appendix at 60a.

STATEMENT OF JURISDICTION

Petitioners' Statement of Jurisdiction is acceptable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Given Petitioners' statement of the Question Presented, the extensive list of statutory provisions and Federal Rules listed by Petitioners is irrelevant to the Court's consideration of this writ as none of the cited and quoted statutes bear upon the Question Presented. Nor does Fed. R. Civ. P. 11.

IUE nevertheless agrees with the citation to Fed.R.Civ.P. 41(b).

COUNTER-STATEMENT OF THE CASE

Plaintiffs initially filed their action in Ohio State Court and Defendants timely sought its removal. App. 48a

Thereafter, Plaintiffs' prosecution of the case was dilatory in the extreme and, as a result, this action was dismissed on December 30, 1992, pursuant to Fed.R.Civ.P. 41(b). App. 60a.

Reluctant to take that final step without allowing Plaintiffs counsel the opportunity to assure the Court that the

problems of the past would not continue in the future, the District Court's dismissal Order further provided:

> The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management.

App. 61a.

Despite this opportunity, lead counsel "stepped down," co-counsel "temporarily" assumed that position, and new lead counsel attempted to assure the District Court that "all briefing had been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management." App. 68a. Not surprisingly, given the circumstances, the District Court found these assurances insufficient, and denied Plaintiffs' motion to reinstate the case. App. 46a.

On appeal, the Sixth Circuit saw the key issue to be "whether the district court properly dismissed the case for dilatory case management. . ." App. 12a. After an exhaustive review of the history of the case below, the Sixth Circuit also concluded that dismissal was wholly appropriate. App. 1a.

Petitioners do not challenge the findings of dilatoriness. Rather they challenge the refusal of the District Court to reinstate this case. They thus challenge the wrong decision.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Petitioners' Question Presented Misrepresents the Decisions of the Sixth Circuit and the District Court

As the sole argument in support of their Petition for a Writ of Certiorari, Plaintiffs assert that the Sixth Circuit affirmed the District Court's dismissal for the insubstantial and indefensible reason that "an attorney of record who was not 'lead counsel' signed a motion." Petition at 13. That point of contention is simply not what happened in the disposition of the case below.

As the Sixth Circuit noted, not once, but twice:

> The matter before this court is whether the district court properly dismissed the case for dilatory case management pursuant to Fed.R.Civ.P. 41.

App. 2a. And:

> Although Plaintiffs raise 25 issues of error on appeal, the only relevant issue before us is whether Plaintiffs' dilatory prosecution of the case warranted dismissal pursuant to Fed.R.Civ.P. 41(b). (Footnote omitted.)

App. 11a. In answer to this question, the Court of Appeals found:

> The district court dismissed the action based on prior dilatory case management and the failure to comply with the magistrate judge's orders.

App. 12a. Plainly, the Sixth Circuit recognized, understood, and held that the issue of the dilatory prosecution of this case, not the issue of who signed a motion to reinstate, formed the basis for dismissal by the District Court and its affirmance by the Sixth Circuit.

Petitioners are quite simply in error as to the basis for the decision of the district and appellate courts. As such, their contention that this is an appropriate case for review must fail.

II. Petitioners Are Attempting to Divert Attention From the Findings of Dilatory Case Management

Petitioners acknowledge, in passing, the Sixth Circuit's view that the District Court dismissed this action for dilatory case management, but contend that the Sixth Circuit misapprehended "Judge Lambros' own reasons for dismissing the case."[1] Petition at 13. Petitioners understandably seek to draw this Court's attention from the damaging findings of the Sixth Circuit:

> The clear record of delay is undeniable. For over three years, Plaintiffs missed deadlines, filed inadequate motions and responses, and disregarded specific orders from the magistrate judge.

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[1]Petitioners confuse the decision of the District Court, denying the motion to have the case reinstated (App. 68a), with the original decision of the District Court dismissing the action for dilatory conduct of the litigation (App. 46a). Petitioners' entire argument is founded upon the belief that the denial of the Motion to Reinstate affected the dismissal of the litigation. This assertion is wholly lacking in logic or support in the record.

> After Defendants filed two sets of summary judgment motions, Plaintiffs filed ten volumes of unauthenticated and unreliable documents and short 'briefs' lacking responsive arguments. Although the magistrate judge showed considerable patience and tried to guide Plaintiffs in amending their filings, the Plaintiffs never complied with the magistrate judge's suggestions about how to plead a meritorious case.
>
> Finally, after the magistrate judge had granted three extensions based on questionable excuses, he imposed a final, inflexible deadline that Plaintiffs ignored. ... Plaintiffs failed to respond until 16 days after the final deadline.

App. 15a.

Petitioners' hesitancy to confront the accuracy of these embarrassing findings and conclusions is as understandable as it is fatal. Petitioners' obligation under Rule 14.1(a) of the Supreme Court is to set forth those questions they wish reviewed, and "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Because Petitioners have failed to seek review of the Sixth Circuit's decision on the merits of the lower Court's dismissal, they have failed to address an issue which would

allow this Court to grant the Petition.

III. The District Court Judge Did Not Abuse His Discretion

While Petitioners contend that the District Court should have reinstated their case subsequent to dismissal because they satisfied the concerns of District Court Judge Lambros, no reasonable basis for disturbing the dismissal of this case exists.

Given the unprecedented history of dilatory, inadequate and unresponsive representation by Petitioners' counsel, the duty of the District Court to concern itself over future management of the case by Plaintiffs' counsel cannot be overlooked. Nor can the court's conclusion that counsel failed to assure that the future would be different from the past.

Despite the international ubiquity of fax machines, Plaintiffs' lead counsel, Daniel Todt, never signed the certification required by the District Court. The suggestion of Petitioners that it should not have mattered which counsel of record signed the motion[2] is at odds with their certification to the District Court. There, it was plainly acknowledged that Daniel Todt had been lead counsel, that Rebecca Todt was taking over as lead counsel, and that such a change was merely temporary:

> Plaintiffs request that this Court take notice that as of this date, Rebecca L. Todt will temporarily assume the position

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[2]E.g., "...case law supports joint and several responsibility among attorneys of record for all aspects of motion practice and case management." Petition at 18.

> of lead counsel in this case due to international commitments that have arisen placing extensive time restraints on Daniel T. Todt.[3]

App. 68a. The certification then continued that "Rebecca L. Todt hereby certifies..." that Plaintiffs' counsel's future would be in conformity with the Court's Rules.

The failure of (temporarily) and conveniently indisposed lead counsel to sign a motion guaranteeing the manner in which the case will be handled in the future, and his failure to supplement the certification when its inadequacies were highlighted by Defendants, provides an unassailable basis for the refusal of the District Court to reinstate Plaintiffs' case. Counsel for Plaintiffs did not give any indication as to how long Mrs. Todt wold hold her new position as lead counsel. They did not advise the court under what circumstances that role would revert to Daniel Todt. They did not indicate how long these unspecified "international commitments" would prevent Daniel Todt from resuming his role as the Plaintiffs' principal counsel. They did not indicate any reason why he could not have the certification sent via Federal Express to him in Germany for execution, or why his signature could not be presented as a faxed copy, to be substituted with an original.[4] Under these

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[3]Petitioners brief claims that "Mr. Todt's absence was by no means 'unspecified'." Yet his "international commitments" were never revealed to Defendants' counsel or divulged in any document heretofore filed with the lower Court.

[4]The Memorandum Opinion and Order dismissing and terminating the case was issued on December 30, 1992. App. 46a. The Certification solicited in that Memorandum Opinion and Order was filed as a Motion to Reinstate & Certification on January 12, 1993.

circumstances, including the dilatory, inadequate and unresponsive representation provided by Daniel T. Todt as Plaintiffs' counsel from the inception of the case, the decision of the District Court to deny substitute lead counsel's motion to reinstate this case (App. 46a) was not an abuse of discretion.

IV. No Special Considerations Warrant Granting Certiorari

Rule 10 of the Supreme Court sets forth the general considerations determining whether a writ of certiorari should be granted. None of the considerations identified in that rule are presented by this case. The facts and arguments of this case make it somewhat unique, as far as the remarkable behavior of Plaintiff's counsel is concerned. However, that does not create a basis for the Court to hear this case. As amply demonstrated by the Sixth Circuit, case authority provides a sound basis for upholding the dismissal of this case, pursuant to Fed.R.Civ.P. 41(b). The conduct here was far beyond that which can and should be tolerated by any district court. The decisions of this and other courts support this result. Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Little v. Yeutter, 984 F.2d 160 (6th Cir. 1993); Buck v. Dept. of Agriculture, 960 F.2d 603 (6th Cir. 1992); Shepard Claims Service, Inc. v. William Darrag & Associates, 796 F.2d 190 (6ty Cir. 1986); Carter v. City of Memphis, 636 F.2d 159 (6th Cir. 1980).

App. 68a. Defendants opposed the requested reinstatement on January 22, 1993. App. 70a. The district court did not rule on the motion of Plaintiffs until February 25, 1993. App. 46a.

V. Conclusion

For all of the foregoing reasons, the Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

Attorneys for Respondent International Union of Electronic, Electrical, Technical and Salaried Workers, AFL-CIO

James G. Mauro, Jr.
1126 Sixteenth Street, N.W.
Washington, D.C. 20036-4866

Mark A. Rock
Schwarzwald & Rock
616 Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114-1503